Foreword

The following address was delivered by the Honorable James H. Malone, before the City Club of Memphis, on November 26, 1911. Mr. Malone was not himself a member of the Club, but was requested to make the address, owing to his eminence as a lawyer and his known familiarity with the subject of the discussion.

While the Committee was authorized to have the address printed for general circulation, still it is well known that the best informed men often differ as to the mere details of any great movement. The address is sent forth, therefore, as the distinct views of Mr. Malone, but with the belief that, owing to the great importance of the matters discussed, it will arrest the attention of all thoughtful and patriotic Tennesseans. The movement is entirely non-partisan.

Memphis, January, 1912.

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Why Tennessee Needs a New Constitution

ADDRESS

Delivered by JAMES H. MALONE

Mr. Chairman and Gentlemen:

It is of the highest importance that those who would have the constitution changed should first have a knowledge of that instrument, and how its important provisions have been interpreted by the court of last resort.

It is also very important to know the true office of a constitution in our republican form of government. The popular idea that the constitution is the origin of our natural rights, such as the right to life, liberty and the pursuit of happiness, is entirely erroneous. It has been well said: "A constitution is not the beginning of a community nor the origin of private rights; it is not the foundation of law nor the origin of private rights; it is not the cause, but the consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made; it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits and modes of thought."

In the proposed movement care should be taken not to have misguided friends advocate placing in the fundamental law mere matters of ordinary legislation. These have no place in a constitution. Then, again, erratic

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people will propose all sorts of wild propaganda to go into the constitution. These two kinds of misguided people, though favorable to the movement, really do it as much harm as those who openly oppose the movement.

I will now state some instances in which I think the present constitution should be changed.

A PREMIUM ON IGNORANCE.

The administration of the law in its purity and integrity, especially of the criminal law, lies at the foundation of all good government. This is not possible in Tennessee, for a ban is put upon intelligence and integrity and a premium put upon ignorance, stupidity and even dishonesty in the selection of jurors to try criminal cases.

The law in the constitution ought to be that notwithstanding a man has read a newspaper and formed and expressed an opinion as to the given offense, still, if he will say on oath that he can discard this opinion and give the defendant a fair and impartial trial, and the presiding judge is of opinion that he is a fair man, then he should be allowed to sit in the jury box.

Under the present law all that is necessary is for the defendant to commit a crime so atrocious as to shock the entire community, when hundreds of men are taken from their business, simply to be rejected as jurors, at thousands of dollars of costs, and if a jury is secured it usually has upon it some men, at least, of the lowest type and unfit to administer the criminal laws, for often some of the jury are of the criminal class. In some cases the farcical result has been that no trial can be had, because in the eyes of the law there are not sufficient competent men to try the case. Witness the discharge of the defendants in the DeSoto street murders a few years since, which so shocked this community that mass meetings were held; but the farce ended when, under your present constitution, twelve honest and competent men could not be found in all Shelby County to try the defendants!

Witness the atrocious murder at Reelfoot Lake, which shocked not only America, but civilized Europe. After a reversal by the Supreme Court on a technicality, the cases were dropped, as it was evident no jury could be obtained which would be regarded as competent under the constitution as interpreted by the Supreme Court.

This is a reflection on the intelligence of Tennesseans, and a *reductio ad adsurdum.*

It is estimated that about three times as many murders per year are committed in Memphis, with 131,000 population, as are committed in London, with a population of 7,000,000. This is a shocking statement. However, crime is not confined to Shelby County, but is rife throughout the whole country, for Memphis is no exception in this regard.

Nor is the impossibility to secure competent jurors confined to the cities. Joseph C. Higgins, now on the Court of Appeals, formerly presided over a Circuit Court composed of counties in the heart of rural Middle Tennessee; and he recently declared that in his experience as circuit judge there were four separate miscarriages of justice, because under the law competent jurors could not be found.

When a State has arrived at that place where it confesses it can only punish for the smaller offenses, but is so inefficient that it cannot punish for the most atrocious crimes, then it has abdicated the most important function which excuses its existence.

THE SUPREME COURT SHOULD SIT PERMANENTLY AT NASHVILLE.

Tennessee is about the only State in the Union which compels its supreme judges to junket from East to Middle and from Middle to West Tennessee to hold court. The salaries paid the judges are inadequate, and judges are compelled to separate from their families and live in poor hotels or boarding houses and without the benefits of a law library. Should any one be surprised that when

publications are made showing the comparative standing of the various State decisions, as evidenced by how often the decisions of a given State are cited by the courts of other States, that Tennessee stands near the foot of the list?

The constitution should require the court to sit permanently at Nashville and provide therein an adequate compensation for the judges, beyond the tinkerings of politicians.

As a speedy trial is all-important in criminal cases, the Supreme Court should be required to call the criminal docket from each county three times every year, instead of once, as under the present constitution. This would not only substitute speedy justice for miscarriage of justice, but in one year's time I believe enough could be saved the State and counties in the way of unnecessary bills for boarding prisoners to pay the entire expense of holding a constitutional convention.

TOO MANY ELECTIONS.

We are loaded down with innumerable elections in Tennessee. The sheriffs and trustees must be elected in August every two years, while the Legislature and the Governor must likewise be elected every two years; but this election must be had in November instead of August. The clerks of the criminal, circuit and county courts, the county register and assessor must be elected every four years, while clerks and masters are appointed for six years.

Then comes the city election in November every four years, but in different years from the State and county officers.

While we are not holding regular elections, primaries for various elections are being pulled off; and so on *ad infinitum,* with the result that there is not a single year, nay, a single month, scarcely, that we are not in the throes of a political campaign, and some of them tending to corruption. The people are kept in a constant ferment, to the good of no one and the detriment of all.

Fix the terms of all these officers at four years, and have only one election in four years. It would be almost a benediction from heaven if the Legislature met in Tennessee only once in four years, as is now the law in Mississippi.

FORBID CORRUPT PURCHASE OF POLL TAX RECEIPTS.

There should be a constitutional provision in Tennessee similar to the law in Mississippi, requiring that the poll tax must be paid by March 1 (when the tax becomes delinquent) of the year in which the person offers to vote. This would cut off the corrupt practice of buying up votes by the thousand, under the guise of paying poll taxes by candidates and factions. Likewise make it a crime for divekeepers and ward heelers to gather up and have in their possession batches of registration certificates which are used to debauch the ballot.

VICIOUS SYSTEM OF TAXATION.

Under your present constitution not only double but triple taxation is possible, and is enforced in Tennessee. Take a very simple example. A sells a lot to B for $10,000 on time. B is taxed for the value of the lot, while A is taxed for the $10,000 purchase money. This is double taxation in practical effect, but not so according to the theory of the constitution.

Massachusetts has more money in its banks than the eleven Southern States combined. About all we have is real estate, but we have destroyed its value as a collateral, while it is protected in Massachusetts. In that State the law forbids any mortgage debt to be taxed, and statistics, carefully collected, show that the effect of its passage was not only to create an increase in the market value of real estate, but there was a decrease in the rate of interest throughout the State.

Take one other illustration of double taxation. You tax the capital stock of a corporation, and then turn short around and tax the shares of stock, (the mere evidence of the capital stock) in the hands of the stockholders.

The Supreme Court has held that under your constitution this is not double taxation, saying that every duplication of taxation is not double taxation.

The merchants and manufacturers of Tennessee can tell you how their taxes are duplicated and how they are harassed by back assessments, all of which is so well known that details here are unnecessary. There should be more uniformity and equality in distributing the burdens of taxation.

ABOLISH FEE SYSTEMS.

While the judges of your courts, men of families, and required to be learned in the law, are required to serve for what are beggarly salaries, still the clerks in their courts and the holders of mere ministerial but political offices, swagger around smoking fifty-cent cigars, drawing fees and perquisites, as report goes, from $10,000 to $20,000 a year. Still the Supreme Court has declared two laws, designed to remedy this evil, as unconstitutional.

Where is the man who will stand up and defend such a system of laws?

All these ministerial officers should be put upon good and substantial salaries, thus saving thousands to the people annually; besides, the vast amounts now drawn by these officials make the offices colossal political footballs, and the elections thereto are often tainted by corrupt practices.

STOP PRIVATE LEGISLATION.

Although the constitution plainly provides that no corporation shall be created or its powers increased or diminished by special laws, and although the debates in the constitutional convention showed that its members understood (2 Lea, on p. 431) that this provision embraced municipal corporations, still the Supreme Court held that this mandate did not apply to municipal corporations; hence the perfect riot of acts tinkering with the charters of towns and cities at every session of the Legislature. Some plan to put a ban on private legislation should be devised.

The towns and cities of the State should be grouped into, say, three or four classes, and then charters prescribed for each class, so that the laws would be equal and uniform in each class throughout the State. The result would be that if a faction from one city or town got control of the legislative delegation and should attempt to change the charter, so as to punish their home enemies and put themselves or friends in office, they would be met by men from other towns and cities who would not consent to such an evil law, for otherwise they would be the sufferers from the enactment of this class of vicious legislation. This course has worked well in other States.

TOO MANY COUNTY OFFICERS.

There should be more pliability with reference to the county government. There are several counties in Tennessee with scant 10,000 population, and yet under your present constitution each must have a sheriff, a county trustee, a clerk of the Circuit Court, another for the County Court, a clerk and master of the Chancery Court and a county register. It is well known that in many of these counties these officers do not receive as much as $250 per year. Still the register of Shelby county enjoys an income of over $10,000 a year, and does no work or need do any. He gets $1.75 for recording a deed only ten lines long, and you cannot reduce the fee, because the law would have to apply to the register of Unicoi County also, and a reduction in his fee might starve that official. Why not follow the example of other States as to the smaller counties and let the sheriff collect taxes and abolish the trustee's office? Let one man act as clerk of all the courts and also record deeds, thus having only two officials where you now have six, and in the meantime cut down exorbitant fees.

In some of the larger counties the people would prefer instead of the county court system a government of seven supervisors, as is the case in Mississippi. Let the people of the counties decide these questions for themselves, as is done in Illinois.

CRIMINAL PROSECUTIONS COST TOO MUCH.

The costs of criminal prosecutions in Tennessee are probably higher, proportionately speaking, than any other State in the Union. There is no excuse for this.

There should be a provision in the constitution similar to the Alabama law. That is, there should be a county judge in each county to hold his court twice each month, before whom all minor misdemeanor cases should be brought, upon a simple information, in lieu of your present expensive and dilatory system of indictment by grand jury and a regular court trial in these trivial cases.

Experience in Alabama shows that nine-tenths of these misdemeanor cases are disposed of by the court without a jury; but if a jury is called for, then let the court summon six men on the spot. Judge Higgins estimates that this change would save Tennessee $100,000 per year, besides giving ample time to the regular courts to keep their dockets clear of all felony cases.

CLOTHE GOVERNOR WITH POWER.

It is well known that under the constitution the Governor has no power to call out the militia unless empowered by the Legislature then in session. The statute now on the books on this subject is an attempted evasion of the constitution and believed to be void. Governor Turner vetoed a similar act upon the ground that it was unconstitutional, regretting that he felt constrained so to do.

It is not improbable that some day Tennessee will run red with blood for a want of executive authority to put down a riot or insurrection. In time of peace, prepare for war.

OPPOSITION IS EXPECTED.

My advice is that the tenure of no official should be interfered with; that is, no one should be legislated out of office. You will meet with plenty of opposition. The character thereof is succinctly described by my friend, Chancellor Allison, of Nashville, as appears in the State bar proceedings of May, 1911, as follows:

"Hon. John Allison—Mr. President, I am not going to discuss the question, but I desire to ask the members of the bar present, if you have ever gone out to make a speech in favor of a constitutional convention. Do you recall one who has? You remember, some eight or ten years ago, and I say this in view of the fact that you talk about efforts to amend the constitution, we had a question submitted to the people as to whether the constitutional convention should be called, and I went out through the counties to make speeches; I met a friend of mine and said, "Bill, how is it out here?" He said, "Four to one against it." I said, "What is the matter? How do you explain it?" And he said, "I am against it," and I said, "Upon what grounds?" He said, "I have an office that goes on for four years or six years, and I don't want to be turned out." I said, "That is a good reason for you; what about the other folks?" He said, "The Prohibitionists are against it," and I said, "Why?" And he said, "They are afraid the liquor people will get it," and he said, "The liquor people are against it, for they are afraid the Prohibitionists will get it," and he says, "I am working on both ends." And he says, "The railroads are against it, for fear the people will get it, and the people are against it, for they are afraid the railroads will get it," and he says, "I am working on these two ends, for I tell the railroad men they are right, and I tell the Prohibition folks they are right, for the railroads will sure get it, and I tell the liquor men the Prohibitionists will get it," and, when the vote came in from his county, it was a little over four to one against it."

I do not desire to be understood as placing the seal of condemnation on our constitution in all respects. It was an admirable charter for its day. So was the first constitution adopted by the pioneers in 1796. But as the State was settled and new problems arose, that constitution

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needed changes, and the men of 1834 were equal to the occasion, and framed a new charter far superior to the first constitution. Then came the Civil War, with all its desolation and changes, when the men of 1870 rose up and framed the present organic law, suited to the conditions then existing, but we had scarce emerged from the shadow of the great conflict and the whole country was in a state of transition.

Since 1870 forty-one momentous years have rolled into the silent eternity of the past. During those years greater advances have been made in science, in the diffusion of knowledge, in the accumulation of wealth, and more progress has been made in every department of human activity than in all the past history of Tennessee. There has followed in the train of all these wonderful changes new conditions and new problems, which await men with sufficient courage and ability to meet and solve them, as did the men of 1796, of 1834 and of 1870. Are there such men now in Tennessee?